Raja Lope & Tan Co v Malayan Flour Mills Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–65 OF 1999
FAIZA TAMBY CHIK J
17 DECEMBER 1999

Arbitration *— Award — Interest — Power of arbitrator to award interest — Contractual submission to arbitration, whether implied power to award interest*

Arbitration *— Award — Remission — Issues on damages and interest — Whether issues relate to question of law which cannot be subject to judicial interference — Mitigation of damages for loss of profit not pleaded, whether submission on mitigation should be allowed — Contractual submission to arbitration, whether implied power to award interest*

In arbitration proceedings commenced by the applicant, the arbitrator awarded liability in favour of the applicant. However, the arbitrator reduced the loss of profit which he found as a fact to be 15% to 3% on the ground that the applicant failed to mitigate damages. The arbitrator also did not award interest for the pre-award period. The applicant sought to set aside or alternatively remit the award of the arbitrator on the ground that the arbitrator had committed an error of law on the face of the award. The respondent contended that since the issue of damages (loss of profit) involved the determination of measure of damages and interest thereon, every question of law arising therefrom was therefore a specific question of law and thus the court could not interfere. The respondent also contended that arbitration clause in the contract was not wide enough to confer the power to direct pre-award interest to be paid.

Held:

(1) Every reference to an arbitrator would involve decisions on liability and quantum (damages and interests). To suggest that question of law arising necessarily from the dispute on damages and interests cannot be subject to judicial interference is patently ridiculous. It necessarily means that the arbitrator is always the sole judge on issue of damages and interests and no review on damages can ever arise (see p 233C–D).

(2) To say the issue of 'measure of damages and interest' may be a stated 'question of law' for the decision of the High Court would necessarily means the arbitrator has abdicated his role totally. What was referred to the arbitrator in the instant case was the whole issue of damages and interest thereon. In considering the measure of damages, the arbitrator was to make a finding of facts and incidental to such findings, the law on damages (or interests) as applicable must necessarily arise. No specific point of law was being referred to the arbitrator. If a specific point of law was so

A referred, it must be so stated in the submissions or the award (see pp 235H–236A).

(3) The arbitrator erred in law when he concluded that the law on mitigation of damages requires the applicant to mitigate his damages for loss of profit. The law is that the respondent must allege in the pleadings that the applicant had failed to mitigate his damages and the burden of proof was on the respondent. The issue of mitigation was not pleaded but was raised for the first time in the respondent's submission. The submission was not allowed as the submission was then made without basis (see pp 236H, 237A–F).

(4) The arbitrator was correct to hold that the contractual submission (as oppose to oral or statutory submission) conferred upon him the implied power to award interest. He then contradicted himself by looking at the arbitration clause to see if it confers power to award interest. The ratio decidendi of the authorities clearly show that it was act of submission to arbitration that confers upon the arbitrator the implied power to award interest and not the construction of the arbitration clause, ie it is implicit in every submission that the arbitrator is given power to award interest. The arbitrator therefore erred in law when he said that the arbitration clause was not wide enough to confer power to direct pre-award interest to be paid (see pp 238G–H, 239G).

[Bahasa Malaysia summary

Dalam prosiding timbangtara yang dimulakan oleh pemohon, penimbangtara telah mengawardkan liabiliti memihak kepada pemohon. Namun begitu, penimbangtara telah mengurangkan kehilangan keuntungan yang diputuskannya nyata sebanyak 15% kepada 3% berdasarkan alasan bahawa pemohon telah gagal meringankan kerugian. Penimbangtara juga tidak mengawardkan faedah untuk tempoh sebelum pembuatan award. Pemohon meminta supaya award diketepikan atau secara alternatif menghantar balik award yang dibuat oleh penimbangtara atas alasan bahawa penimbangtara telah melakukan kesilapan undang-undang pada zahir award tersebut. Penentang berhujah bahawa oleh kerana isu berkaitan ganti rugi (kehilangan keuntungan) melibatkan penentuan sukatan ganti rugi dan faedah atasnya, setiap persoalan undang-undang yang berbangkit daripadanya adalah dengan itu satu persoalan undang-undang yang khusus dan justeru itu mahkamah tidak boleh mengganggunya. Penentang juga berhujah bahawa fasal timbangtara dalam kontrak tersebut tidak cukup luas untuk memberi kuasa untuk mengarah supaya faedah sebelum pembuatan award dibayar.

Diputuskan:

(1) Setiap rujukan kepada penimbangtara akan melibatkan keputusan ke atas liabiliti dan kuantum (ganti rugi dan faedah).

Untuk mencadangkan bahawa persoalan undang-undang yang semestinya berbangkit daripada pertikaian ganti rugi dan faedah tidak boleh tertakluk kepada gangguan kehakiman adalah jelas tidak masuk akal. Ia semestinya bermakna bahawa penimbangtara adalah selalunya satu-satu hakim atas isu ganti rugi dan faedah dan kajian semula ganti rugi tidak mungkin berbangkit (lihat ms 233C–D). A B

(2) Untuk mengatakan isu 'sukatan ganti rugi dan feadah' (measure of damages and interest) boleh menjadi 'persoalan undang-undang' yang dinyatakan untuk diputuskan oleh Mahkamah Tinggi semestinya bermakna penimbangtara telah meninggalkan tugasnya sama sekali. Apa yang dirujuk kepada penimbangtara dalam kes ini adalah keseluruhan isu ganti rugi dan faedah atasnya. Dalam mempertimbangkan sukatan ganti rugi, penimbangtara seharusnya membuat keputusan fakta dan secara sampingan keputusan tersebut, undang-undang mengenai ganti rugi (atau faedah) sebagaimana yang terpakai mestilah berbangkit. Tiada hujah undang-undang yang khusus telah dirujuk kepada penimbangtara. Sekiranya hujah undang-undang yang khusus seumpamanya telah dirujuk, ia mestilah dinyatakan demikian dalam penghujahan atau award tersebut (lihat ms 235H–236A). C D

(3) Penimbangtara terkhilaf dalam undang-undang apabila beliau membuat kesimpulan bahawa undang-undang mengenai peringanan ganti rugi menghendaki pemohon meringankan kerugiannya untuk kehilangan keuntungan. Adalah merupakan undang-undang bahawa penentang mestilah mendakwa dalam pliding bahawa pemohon telah gagal meringankan kerugiannya dan beban membukti terletak pada penentang. Isu mengenai peringanan tidak diplidkan tetapi ditimbulkan buat kali pertama dalam penghujahan penentang. Penghujahan tersebut tidak dibenarkan kerana ia telah dibuat tanpa sebarang dasar pada masa itu (lihat ms 236H, 237A–F). E F

(4) Penimbangtara adalah betul dalam memutuskan bahawa pematuhan kontraktual (bertentangan dengan pematuhan lisan atau mengikut perundangan) memberikan kepadanya kuasa tersirat untuk mengawardkan faedah. Beliau kemudiannya menyangkal dirinya dengan mengambil kira fasal timbangtara untuk melihat sama ada ia menganugerahkan kuasa untuk mengawardkan faedah. Ratio decidendi kes-kes jelas menunjukkan bahawa tindakan kepatuhan kepada timbangtara menganugerahkan kepada penimbangtara kuasa tersirat untuk mengawardkan faedah dan bukan pentafsiran fasal timbangtara, iaitu adalah terkandung dalam setiap pematuhan bahawa penimbangtara diberikan kuasa untuk mengawardkan faedah. Maka penimbangtara terkhilaf di sisi undang-undang apabila beliau mengatakan bahawa fasal timbangtara tidak cukup luas untuk G H I

menganugerahkan kuasa untuk mengarah supaya faedah sebelum pembuatan award dibayar (lihat ms 238G–H, 239G).]

Notes

For cases on award of interest in arbitration, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 938–940.

For cases on remission of an award in arbitration, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 946–954.

Cases referred to

Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd [1995] 1 SLR 548 (refd)

Commercial Union Assurance (M) Sdn Bhd v Pilihan Megah Sdn Bhd [1999] 2 CLJ 186 (refd)

FR Absalom Ltd v Great Western (London) Garden Village Society Ltd [1933] 3 All ER 616 (refd)

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428 (refd)

General Tyre and Rubber Co v Firestone Tyre and Rubber Co Ltd [1975] 2 All ER 173 (refd)

Government Insurance Office (NSW) v Atkinson-Leighton Joint Venture (1980) 55 ALJR 212 (refd)

Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy [1982] 2 MLJ 232 (refd)

Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Syarikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Legislation referred to

Arbitration Act 1952 s 22

D Krishna (*Edmund Ponniah* with him) (*Peter Yip & Yong*) for the applicant.

GH Khoo (*Skrine & Co*) for the respondent.

Faiza Tamby Chik J: The applicant/claimant by Notis Usul Pemula dated 7 June 1999 seek to set aside or alternatively remit the awards of the arbitrator Datuk George Seah dated 26 April 1999 (Interim Award No 2) and 20 May 1999 (final award) on the ground that the arbitrator had committed an error of law on the face of the awards because the arbitrator awarded loss of profit at 3% of the value of the balance of the contract works instead of 15%. The arbitrator failed also to award interest for the period before the date of the award.

The court will only exercise its jurisdiction to set aside or alternatively remit the award on the ground that the arbitrator had committed an error

of law on the face of the award if the error of law relates to a dispute referred to the arbitrator in the decision of which a question of law becomes material. If however a specific question of law has been referred to the arbitrator, then it is not a case where the court can interfere on the ground that there has been an error of law on the face of the award. In 2 *Halsbury's Laws of England* (4th Ed) para 623 at p 334, the principles are set out as follows:

> An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
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> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

In *Syarikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, Raja Azlan Shah J said at p 211:

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

The facts are as follows: On 28 September 1992, the applicant/claimant commenced an action before Datuk George Seah. The points of claim, are at pp 18–43 (exh TWS-1) in the affidavit of Tan Wee Sang affirmed on 7 June 1999 (the said affidavit). The defence and counterclaim are on pp 49–63 (TWS-2) and the reply and defence to counterclaim are on pp 44–47 (TWS-1) of the said affidavit. Liability was awarded in favour of the claimant on 6 March 1997. Both parties submitted on damages. The written submission of the respondent are on pp 65–79 while the reply of the claimant are on pp 80–93 (TWS-3). The respondents reply thereto are found on pp 94–102 of the said affidavit. The arbitrator published his interim award on liability on 26 April 1999 (TWS-4 pp 110–122) of the said affidavit. The claimant is not satisfied only with one aspect of the same ie

where the arbitrator reduced the loss of profit which he found as a fact to be 15% to 3% on the ground that inter alia the claimant failed to mitigate damages (the first issue). The arbitrator then published his final award on 20 May 1999. The claimant is not satisfied only with the part of the award wherein the arbitrator did not award interest for the pre-award period (the second issue).

It is a correct statement of the law that when a specific question of law has been referred to an arbitrator, then the court cannot interfere even if the arbitrator's decision was erroneous. However, the respondent submitted that since the issue of damages (loss of profit) involves the determination of measure of damages and interests thereon, every question of law arising therefrom is therefore a specific question of law. I am of the view that the respondent's submission is misplaced for the following reasons:

(i) every reference to an arbitrator (or to the courts for that matter) would involved decisions on: (i) liability; and (ii) quantum (damages and interests). To suggest that question of law arising necessarily from the dispute on damages and interests cannot be subject to judicial interference is patently ridiculous. It necessary means that the arbitrator is always the sole judge on issue of damages and interests and no review on damages can ever arise;

(ii) there is a distinction between a case where a dispute is referred to an arbitrator in which a question of law becomes material and a case where a specific question of law has been referred to the arbitrator. In *Syarikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, Raja Azlan Shah J said at p 211:

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. ... In the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

In *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, where the Supreme Court stated at p 431F–H:

> In *Syarikat Pemborong Pertanian & Perumahan v Federal Land Development Authority*, no question of law was referred to the arbitrator but what was submitted was a question of law which incidentally and necessarily arose in applying certain facts. In our considered judgment in the present appeal, a similar situation arose. It is clear that in applying certain facts which led to the dispute between the parties, the arbitrator had also to construe the provisions of s 37 of the SGO which was relied by the respondent and also s 42 which incidentally arose in applying those facts. Since the reference involved both questions of law and fact, the High Court was in a position to review the award if and when there is an error apparent on the face of the award.

(iii) the Malaysian position is consistent with the English House of Lord's decision in *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] 3 All ER 616, where Lord Wright said at p 625:

> In *Hodgkinson v Fernie* (1857) 3 CB (NS) 189, there was no error of law apparent on the face of the award, but the principle stated has frequently been applied, in particular by the House in *British Westinghouse Electric and Manufacturing Co v Underground Electric Railways Co of London* [1912] AC 673, where an award was set aside as containing an error on its face. Though it was expressly based on the judgment of a Divisional Court given on a consultative case stated by the arbitrator, this House held that the judgment of the Divisional Court was erroneous in law. Lord Haldane LC, said ([1912] AC at p 686):
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> > 'It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson v Fernie* was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson v Fernie* to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land.'
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> The rule was again re-stated with approval by Lord Dunedin, giving the opinion of the Privy Council in *Champsey Bhara & Co v Jiraj Balloo Spinning and Weaving Co Ltd* [1923] AC 480. I know of no authority that limits its application so as to exclude cases in which a question of law must necessarily arise; indeed, if that were so the rule would be in effect meaningless. The rule in truth applies to the ordinary case where in the words of Lord Dunedin the submission refers 'to the arbitrator the whole question whether it depends on law or on fact.' To be contrasted with such cases there is the special type of case where a different rule is in force, so that the court will not interfere even though it is manifest on the face of the award that the arbitrator had gone wrong in law. This is so when what is referred to the arbitrator is not the whole question whether involving both fact or law, but only some specific question of law in express terms, as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quoted that submission, in dispute. Such a case is illustrated by the *Kelantan Government v Duff Development Co Ltd*, where Lord Cave LC said ([1923] AC 395 at p 409):
>
> > 'But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion.'
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> This House held in that case that the only questions to be determined by the arbitrator, there being no facts in dispute, were the questions of law as to the construction of the contract. That decision followed *Re Arbitration between King and Duveen & Ors*, in which Channel J said [1913] 2 KB at p 36), in distinguishing *British Westinghouse Electric and Manufacturing Co v Underground ElectriRailways Co of London*:

> 'It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside.'

The learned judge shrewdly adds: 'Otherwise it would be futile ever to submit a question of law to an arbitrator.

In the instant case there was no 'specific question of law in express terms' being referred to the arbitrator but there were many disputes as to facts as shown in the claimant's claim and the respondent's reply. After deciding in the first Interim Award on issue of liability, the arbitration proceeding continued to determine the whole issue (not question) of damages and interest thereon to be paid to the applicant/claimant. Lord Russell in the *FR Absalom*'s case quoted *Re Arbitration between King and Duveen & Ors* [1913] 2 KB 32 and said at p 622:

> '... [where] the question submitted to the arbitrator was whether upon a defined state of facts *A* was liable under a certain agreement to pay damages to *B*. The arbitrator decided that he was not liable. *B* moved to set aside the award on the ground that the award had found facts which showed that upon the true construction of the agreement *B* was entitled to damages, and that accordingly there was error of law on the face of the award. It was held that the award could not be set aside, because a specific question of law had been submitted to the arbitrator's decision.'

Hodgkinson v Fernie (1857) 3 CB (NS) 189 was an action for damages, the plaintiff's ship having been run down owing, as it was alleged, to the negligent navigation of the defendant's ship. At the trial a verdict was entered for the plaintiff for damages, the amount being referred to an arbitrator. The arbitrator made an award, simply fixing the damages at a sum of £713. Cockburn CJ said at p 716:

> 'I am of opinion that this rule should be discharged. Without entering into a consideration of the merits of the case, or inquiring whether or not the arbitrator was right in allowing the sum in question as damages in the action, I am of opinion that we have no jurisdiction. It is not easy to reconcile all the decisions as to how far the court will interfere with the determination of an arbitrator, whether upon the law or upon the facts. But the modern cases which have been cited certainly go to the length of deciding, that, unless there be something upon the face of the award to show that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it.'

(iv) a parallel may be drawn with s 22 of the Arbitration Act 1952 where the arbitrator may state, inter alia, 'any question of law arising in the course of the reference' in the form of a special case for the decision of the High Court. To say the issue of 'measure of damages and interest' may be a stated 'question of law' for the decision of the High Court would necessarily means the arbitrator has abdicated his role totally;

(v) what was referred to the arbitrator in the instant case was the whole issue of damages and interests thereon. In considering the measure of damages, the arbitrator was to make a finding of facts and incidental

to such findings, the law on damages (or interests) as applicable must necessarily arise. No specific point of law was being referred to the arbitrator;

(vi) if a specific point of law was so referred, it must be so stated in the submissions or the award (see *Commercial Union Assurance (M) Sdn Bhd v Pilihan Megah Sdn Bhd* [1999] 2 CLJ 186).

What constitute error of law? In this, I need only to quote from the dictum of Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 342:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he miscontrues the terms of any relevant statute or misapplies or misstates a principle of the general law.

In the instant case, this application is restricted to review of the arbitrator's finding on loss of profit. In cll 47.1 to 47.3 of Interim Award No 2 (see pp 116–117 of Notis Usul Pemula) the arbitrator has found as a fact that the loss of profit was 15% of the balance contract works of RM3,741,134.56.

> 47.1 I turn now to deal with the 15% claimed by the claimant. Besides the testimony of Tan Wee Sang (CW1), who has had thirty years experience in the construction industry there is also the expert evidence of the Soo Seng (CW2), a registered quantity surveyor since 1982 and in private practice with effect from 1995. CW2 seems to support the use of 15% to allow a profit element.
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> 47.2 The respondent has ample opportunity to call an expert witness to give rebutting evidence but they chose not to do so.
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> 47.3 For the above reasons I will therefore admit the 15% de bene esse meaning on a provisional basis subject to the followings, namely:
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> (a) The Contract Act imposes on the claimant the duty of taking reasonable steps to mitigate the loss consequent on the breach of contract and debars the claimant from claiming any part of the damage which is due to their neglect to take such steps;
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> (b) Upon termination of the contract the claimant were placed in a situation where they could immediately take on equally profitable work elsewhere, if any.

However, the arbitrator erred in law when he concluded in cll 47.3(a) and (b) that the law on mitigation of damages requires the claimant to mitigate his damage for loss of profit and as the claimant was a bankrupt, he said at cl 48.2:

> It follows that the bankruptcy of the claimant no steps were taken by the claimant with regard to items (a) and (b) aforesaid.

In coming to this erroneous finding of law, the arbitrator at cl 48.3 concluded:

A Taking into account the claimant has a duty to mitigate the loss, in my opinion, a fair and reasonable percentage to be applied in the context of this case would be 3 %.

I observe that the error of law as appeared in cl 47.3 and 48 is as follows:

(i) The law is that the respondent must allege in the pleadings, that the B claimant had failed to mitigate his damages and the burden of proof is on the respondent. See 12 *Halsbury's Law of England* (4th Ed) at para 1193:

> Where a defendant alleges that the plaintiff has failed to take all reasonable steps to mitigate his loss, the burden of proof is upon the C defendant.

See also *Mcgregor on Damages* (15th Ed) at para 1154:

> On the measure of damages where the owner acts so as to bar completion there appear to be, surprisingly, no English cases. General principles would put the normal measure at the contract price less the cost to the D builder of executing or completing the work. In calculating the builder's costs the indirect as well as the direct costs must be included, especially 'overheads'. This measure, however, should be subject to reduction if the defendant can show that the time made available to the plaintiff by the breach has been, or could have been, used by him in executing other profitable contracts with which would not otherwise have been able to E contend. This is analogous to the cases of manufacturing and erecting machinery dealt with under sale of goods.

(ii) the issue of mitigation was not pleaded;

(iii) the issue of mitigation was not raised at the trial and no evidence was led on this issue;

F (iv) the issue of mitigation was raised for the first time in the respondent's submission but there was no evidence showing the claimant had failed to mitigate, the burden of which is on the respondent. In any event, if not pleaded, the submission is not allowed as the submission is then made without basis. '... [T]he issue of the lack of jurisdiction of the civil courts was never pleaded and the learned trial judge was right in G not taking counsel's submission on this issue into consideration as it was made without a basis in that it was not supported by the pleadings': per Salleh Abas LP in *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* [1982] 2 MLJ 232;

(v) The arbitrator wrongly concluded that the claimant was a bankrupt in H 1989 [when the contract was terminated] as a fact of failure to mitigate when the claimant only became a bankrupt in 1992 [well after the contract period];

(vi) the arbitrator wrongly concluded in cl 48.3 that in the Colorado (USA) case of *Gunderson Inc & Tull* (1983) p 2D, the court awarded 1% as loss of profit when in fact, the finding of the court there was that I the contractor had 'submitted a profit estimate which was within one per cent of the 'as bid' profit margin' (see para 43.5 of Interim Award No 2 at p 113 of Notis Usul Pemula).

The Final Award dated 20 May 1999 (p 142 of Notis Usul Pemula) dealt with the issue of interest and costs. In the instant case, the arbitrator failed to award interest on damages despite the basic principle as enunciated by Lord Wilberforce in *General Tyre and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] 2 All ER 173 at p 192:

> Interest is not awarded as punishment against a wrongdoer for withholding payments which should have been made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment.

In fact in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1995] 1 SLR 548, Lai Kew Chai J went as far as to say (at pp 556–557) that:

> With regard to the specific exercise of awarding interest in an arbitration, it is the law that generally interest should be awarded on a successful claim. An arbitrator who awards a sum of money but fails to award interest to compensate the successful claimant accordingly has prima facie misconducted himself in the technical sense of the word: *Panchaud Freres SA v Pagnan and Fratelli* [1974] 1 Lloyd's at p 394. Lord Denning MR (as he then was) said: '[i]n a commercial transaction if the plaintiff has been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for good reason. An arbitrator may decline to award any interest or award interest at a lower rate or for a shorter period but he must have reasonable grounds for doing so and he should set out these reasonable grounds in his award.'

The arbitrator in the instant case erred in cl 58.3 (at p 143 of Notis Usul Pemula) when he held:

> 58.2 Following *Chandris'* case and *Ahong*'s case I agree with submission of counsel for the respondent that the powers of the Arbitral Tribunal to award interest is derived from the contractual submission of the parties to the Arbitral Tribunal and this submission necessarily give the Arbitral Tribunal the 'implied powers ...'
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> 58.3 I also agree with the submission of the respondent's counsel that arbitration clause (cl 66) in the contract is not wide enough to confer the power to direct pre-award interest to be paid.

The arbitrator was correct in 58.2 that the contractual submission (as oppose to oral or statutory submission) confers upon him the implied power to award interest. He then contradicted himself in 58.3 by looking at the arbitration clause to see if it confers power to award interest. The ratio decidendi of the authorities will clearly show that it was act of submission to arbitration that confers upon the arbitrator the implied power to award interest and not the construction of the arbitration clause, ie it is implicit in every submission that the arbitrator is given power to award interest. In *Lian Hup Manufacturing Co Sdn Bhd v Unitata Berhad* [1994] 2 MLJ 51 the court stated at p 546:

> According to *Chandris'* case, the power of an arbitrator to award interest was derived from the submission to him which impliedly gave him power to decide

A all matters of difference according to the existing law of contract exercising every right and discretionary remedy given to a court of law. The court decided that the arbitrator had the power to award interest.

In the present case the parties have agreed in the arbitration clause in the contract (encl 1 exh LWH2) that the construction, validity and performance be governed by Malaysian law. Under s 11 of the Civil Law Act, the court has B the discretionary power to award interest for the recovery of any debt or damages. See *Evergrip Prestressing Sdn Bhd v Ken Construction & Trading Sdn Bhd* [1991] 3 CLJ 2149. In my view the arbitrator in the present case has the same power as that of the court to award interest at such rate as he thinks fit. Since it was within the discretionary power of the arbitrator to award interest in this case, the court would not interfere with the exercise of his discretionary C power.

In *Ahong*'s case aforesaid, Lai Kew Chai J having reviewed *Chandris* and other authorities concluded as a matter of law that 'In the end, I came to the conclusion that so far as the power of award interest was concerned, it is in my view implicit in a reference or submission to arbitration that parties have D conferred power on the arbitrator to award interest as if the matter in difference were litigated in a court of law' (see p 556F–G).

The High Court in Australia in the case of *Government Insurance Office (NSW) v Atkinson-Leighton Joint Venture* (1980) 55 ALJR 212, Justice Stephen after reviewing all relevant authorities, concluded at p 224:

E The principle to be extracted from this line of authority is that, subject to such qualifications as relevant statute law may require, an arbitrator may award interest where interest would have been recoverable had the matter been determined in a court of law. What lies behind that principle is that arbitrators must determine disputes according to the law of the land. Subject to certain exceptions, principally related to forms of equitable relief which are of no present relevance and which reflect the private and necessarily evanescent F status of arbitrators, a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction. As *Russell on Arbitration* (19th Ed, 1979) puts it at p 356, speaking of an arbitrator's power to award interest up to the date of his award, 'it was always considered that he had power to do so, by virtue of his implied authority to follow the ordinary rules of law'.

G In law therefore, every arbitrator has the implied power to award interest by the mere act of submission; it is not dependent on the arbitrator's construction or interpretation of the arbitration clause because the power does not emanate from the clause. The arbitrator therefore erred in law when he said in cl 58.3 that the arbitration clause is not 'wide enough' to H confer power to direct pre-award interest to be paid.

The arbitrator published his Interim Award on liability on 26 April 1999. In it he reduced the loss of profit which he found as a fact to be 15% to 3% because the applicant/claimant failed to mitigate its loss. This is the first issue. On 20 May 1999 he published his Final Award. In it he did not award interest for the pre-award period. This is the second issue. For the I reasons which I have already given on the first issue it is hereby ordered that cll 47 and 48 of the Interim Award No 2 be remitted to the arbitrator with direction to restore the original 15% of the balance contract sum for the

applicant/claimant as loss of profit. On the second issue it is hereby ordered that interest for pre-award period of the final award be remitted to the arbitrator with direction to award interest at 8% pa on damages from the date when such payment represented by damages ought to have been made to the date of payment. In the result I made the order in terms of (3), (5) and (6) of Notis Usul Pemula dated 7 June 1999.

Order accordingly.

Reported by Jafisah Jaafar